

TAB 27

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[1] CAUSE NO. GV002327
[2] THE STATE OF TEXAS)IN THE DISTRICT COURT
ex rel.)
[3] VEN-A-CARE OF THE)
FLORIDA KEYS, INC.,)
[4] Plaintiffs,)
[5] VS.)TRAVIS COUNTY, TEXAS
[6] DEY, INC.; ROXANE)
LABORATORIES, INC.; WARRICK)
[7] PHARMACEUTICALS CORPORATION;)
SCHERING-PLough CORPORATION;)
[8] SCHERING CORPORATION;)
LIPHA, S.A.; MERCK-LIPHA, S.A.:)
[9] MERCK, KGAA; AND EMD)
PHARMACEUTICALS, INC.,)
[10] Defendants.)53RD JUDICIAL DISTRICT
[11] ORAL AND VIDEOTAPED DEPOSITION OF
[12] JUDY WATERER
[13] VOLUME II
APRIL 1ST, 2003
[14]
[15] ORAL AND VIDEOTAPED DEPOSITION OF
[16] JUDY WATERER, produced as a witness at the instance of
[17] the State of Texas and duly sworn, was taken in the
[18] above-styled and numbered cause on the 1st of April,
[19] 2003, from 9:06 a.m. to 6:10 p.m., before
[20] Debra L. Sietsma, CSR in and for the State of Texas,
[21] reported by machine shorthand, at the offices of
[22] Vorys, Sater, Seymour & Pease, L.L.P., 2100 One
[23] Cleveland Center, Cleveland, Ohio, pursuant to the
[24] Texas Rules of Civil Procedure and the provisions as
[25] previously set forth.

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[1] A: To me, when I hear "Medicaid," what comes to
 [2] my mind is Medicaid rebate. That's — that's the
 [3] relationship our company has with Medicaid.
 [4] Q: Do you recall approximately when Roxane began
 [5] considering doing an across-the-board WAC decrease on
 [6] dozens of SKUs?
 [7] A: I know we did it. We did a small subset
 [8] first and then the whole rest of it. I don't remember
 [9] the specific time frame.
 [10] (Exhibit 855 marked).
 [11] Q: (BY MR. ANDERSON) Ms. Waterer, I'm going to
 [12] hand you what's been marked as Deposition Exhibit 855,
 [13] ROX-TX-14599 sequentially through 14608. It's a
 [14] composite exhibit, and it was produced by Roxane in
 [15] this litigation.
 [16] Steve, you're welcome to take a look at
 [17] it, if you want.
 [18] MR. MCCONNICO: Thank you.
 [19] MR. ANDERSON: I've highlighted some
 [20] portions of it.
 [21] MR. MCCONNICO: Thank you.
 [22] MR. ANDERSON: Sure.
 [23] Q: (BY MR. ANDERSON) You're welcome to review
 [24] the entire exhibit, Ms. Waterer.
 [25] A: Thank you.

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[1] Q: You haven't had a chance to —
 [2] A: — in that much detail but —
 [3] Q: Okay. Well, we're going to get into that;
 [4] and we may point out a few that didn't change at all.
 [5] Now, that's dated March 13th of '98; and
 [6] that's when the WAC decrease and the AWP changes were
 [7] implemented, correct?
 [8] A: Yes.
 [9] Q: And that was not only sent to Roxane's
 [10] customers, but that was sent to the pricing services?
 [11] A: Yes.
 [12] Q: Was this sent to First DataBank?
 [13] A: Rich would have sent it. He was doing all
 [14] the communications with First DataBank at that point.
 [15] It would have been his responsibility to send it. I
 [16] would have to assume that he did send it.
 [17] Q: Well, since in December of '97 Roxane had
 [18] chose to no longer publish WAC prices to First
 [19] DataBank, would Roxane have sent those new WACs?
 [20] A: They would have sent just the AWPs then.
 [21] Q: Right. Just the AWPs?
 [22] A: Correct.
 [23] Q: Okay.
 [24] A: I believe so.
 [25] Q: Now, I also would like to point your

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[1] Q: My first question is: This document has a
 [2] cover letter dated March 13th of 1998; is that
 [3] correct?
 [4] A: Yes.
 [5] Q: And the first bullet point is "WAC/AWP
 [6] Changes." Is that correct?
 [7] A: Correct.
 [8] Q: And then attached to the letter is a listing
 [9] of — of all of Roxane's drugs and the new AWP, the
 [10] new WAC, the old AWP and the old WAC. Is that
 [11] correct?
 [12] A: Yes. I — I think it's all of the products.
 [13] I don't know if there were a couple left off the
 [14] change.
 [15] Q: All right. But you don't have any reason to
 [16] think that there were any products left off here, do
 [17] you?
 [18] A: I — I really don't remember.
 [19] Q: Okay.
 [20] A: I don't know if that's the whole list or just
 [21] the ones that were changed. I know it's the ones that
 [22] were changed.
 [23] Q: But there are some on here that didn't change
 [24] at all, correct?
 [25] A: I didn't see it —

[1] attention to Tupa Exhibit 652; and this was a two-page
 [2] exhibit, ROX-TX-01264 and 1265.
 [3] Steve?
 [4] MR. MCCONNICO: No.
 [5] Q: (BY MR. ANDERSON) Okay. This was used in
 [6] the deposition of Mr. Tupa, your former boss; and it's
 [7] written by you to Mr. Gerstenberg, and you copied
 [8] Mr. Tupa. It's dated February 7th, '98 —
 [9] A: Okay.
 [10] Q: — titled "WAC Adjustment Implementation
 [11] Update." If you could, take a look at that, and then
 [12] I'll have some questions about that as well.
 [13] Do you recall roughly when Roxane
 [14] started analyzing whether or not they should do a WAC
 [15] adjustment?
 [16] A: When they started, no.
 [17] Q: Would it have been several months prior to
 [18] February 7th of '98?
 [19] A: I believe — I — I believe it's even
 [20] referred to in here. We did something that we called
 [21] baby WAC and big WAC; and baby WAC was run the year
 [22] before we implemented the big WAC, as a trial balloon.
 [23] If big WAC happened in '98, baby WAC would have been
 [24] third or fourth quarter '97.
 [25] Q: And when you say "baby WAC," are you

A: Uh-huh.

Q: Wouldn't it be appropriate on this generic drug, hydrochlorothiazide, for a Medicaid program to base reimbursement on a WAC there?

MR. MCDONALD: Object to the form.

THE WITNESS: It's — one could argue whether it's a generic drug.

Q: (BY MR. ANDERSON) Okay. Well, is that the WAC that's being charged in the marketplace?

A: WAC is the price that wholesalers buy every one of our products for.

Q: And you've raised the WAC on that product because the market prices have gone up, correct?

A: We've raised the price on that product, it looks like, probably by consumer price index, because it's like a brand product.

Q: And if a Medicaid program didn't pay off of WAC on that product, would your customers be upset?

MR. MCDONALD: Object to the form.

THE WITNESS: I — I don't know what would or wouldn't upset them if they didn't base it on WAC and based it on something else that made sense. I don't think anybody would object. I don't know. I — I don't — I — I didn't set this up. It was in existence before I think generics even began.

Q: (BY MR. ANDERSON) When you were at Roxane, you controlled the AWP and the WAC prices, correct?

MR. MCCONNICO: Objection, form.

THE WITNESS: I had influence over them.

Q: (BY MR. ANDERSON) You set those prices; and then ultimately Ed Tupa authorized the publishing of those prices, correct?

A: I instituted changes to the prices, and on new-launch products I set them; but I did not create the pricing that was there prior to me getting there.

Q: Well, that's a good point. And, for instance, we had questioning today about hydromorphone.

When you got to Roxane, you raised the AWP on that generic product, didn't you?

A: Yes.

Q: And that went out and Medicaids reimbursed based upon that increased AWP?

A: I brought the AWP into standard with everybody else so that we not — were not getting discriminated against in purchasing decisions. Did I go out and set a new price that was designed to impact the reimbursement on a program I didn't know existed to influence a buying decision, no. I just leveled the playing field. I tried to take away a

(1) disadvantage because analysis said that was causing

(2) it. Apparently the systems that were in place were (3) forcing us to be disadvantaged.

(4) Q: When you lowered the WAC on the haloperidol (5) product from \$450 to \$33, did you notify the Medicaids (6) of that decrease?

(7) A: I don't notify Medicaid of anything.

(8) Q: Did you notify First DataBank of that (9) decrease?

(10) A: We don't report WACs to First DataBank.

(11) Q: Did you report to First DataBank the increase (12) in AWP?

(13) A: We report AWPs, whether they go up or down or (14) stay the same, to First DataBank.

(15) Q: Well, that's a good point.

(16) If you could, do you know whether or not (17) a single AWP of all these drugs listed in 855 went (18) down?

(19) A: No.

(20) Q: Not a single one?

(21) A: I don't know. I'd have to go through and (22) look at it.

(23) Q: But, yet, several went up, didn't they?

(24) A: On the brand products they went up. I don't (25) know if any went down. I'd have to study it.

(1) Q: Well, take your time. Flip through that and (2) tell me if any of those AWPs went down.

(3) A: There's nine pages. I'm on Page 6. I (4) haven't found one; so if any did, it would have been (5) very few.

(6) Q: All right. Now, earlier I mentioned briefly (7) if you knew a gentleman named Jim Rowenhorst; is that (8) right?

(9) A: Yes.

(10) Q: And your — your response was that you had (11) heard the name but you couldn't —

(12) A: I probably met him; but he's not somebody (13) that I know well enough that, if I saw him again, I'd (14) be "There's Jim."

(15) Q: All right.

(16) A: He would be familiar to me.

(17) Q: Have you reviewed some documents recently (18) pertaining to communications you had with

(19) Mr. Rowenhorst?

(20) A: I don't think so, no.

(21) Q: Have you reviewed any documents recently that (22) pertained to the WAC and AWP changes implemented in (23) March of '98?

(24) A: I don't think so. I don't recall.

(25) Q: If I could, I'd like you to take a look at

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with it?" I wouldn't have seen the proposal.

Q: Would the spreadsheet that you would have reviewed also had competitors' competing offers on a product as well as their AWP?

A: Currently — well, we've had so many different ways of doing it.

Oh, I'm sorry.

I don't know if it would be on the spreadsheet; but we would try to have that information so we could understand where the market was set, figuring we'd have to meet or beat that to be competitive.

Q: In making that analysis as to how to be competitive, would you analyze your competitors' bid prices?

A: Yes.

Q: In making that analysis as to how to be competitive, would you analyze your competitors' AWPs?

A: No.

Q: Then how would you go about addressing GeriMed's concern that there be a increased revenue through a better spread?

A: I think that's their issue in their decision-making. I never saw that. I just agree or — I — I would approve or disapprove pricing and

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terms on the bid.

Q: Other than the marketing department, was there any other department at Roxane that controlled the setting and publication of AWP pricing?

A: Over time — let me think.

For the duration of time that I was there, the responsibility very quickly shifted to me. The publication of it — contracts handled some kinds of notifications, and Rich Feldman handled some kinds of reporting. Over time it varied.

Q: Other than the marketing department, were there other departments at Roxane that controlled the setting and publication of WAC pricing?

A: I think that would be the same answer.

Q: Now, if I could, I'll — I'll draw your attention to page ROX-TX-04066, which also is part of Exhibit 251, and I'll read this for the benefit of the jury.

"Reimbursement Assistance. The GeriMed binder and emphasis system provide item-by-item detailed printouts and screens with the state MACs and calculations per state. The GeriMed program identifies the lowest-cost product and the best spread for the particular state."

Did I read that correctly?

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[1] A: Yes.

[2] Q: Would you have had any involvement in [3] addressing GeriMed's concerns regarding the best [4] spread in that context?

[5] A: It sounds to me like GeriMed was providing [6] this information to their own members, so no. I don't [7] recall ever seeing this document, so I couldn't [8] have done anything to respond to it.

[9] Q: Are you aware that in the generic industry, [10] and the brand industry, for that matter, that GeriMed [11] would provide information such as the difference [12] between AWP and cost to its members?

[13] A: No.

[14] Q: Are you aware that in the pharmaceutical [15] industry that wholesalers would provide information to [16] their pharmacy customers regarding the spread between [17] AWP and cost on pharmaceuticals?

[18] MR. MCDONALD: Object to the form.

[19] THE WITNESS: I know they published — [20] or at least I used to know. When I was calling on [21] them, I saw that they frequently published AWPs and [22] they frequently published what their price in the [23] catalog was going to be to the customer. I don't [24] recall them ever putting an association between the [25] two.

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[1] Q: (BY MR. ANDERSON) Have you ever seen or [2] heard about software that major wholesalers offer to [3] their customers?

[4] A: Wholesalers derive a significant portion of [5] their earnings from software systems that they supply [6] their customers, yes.

[7] Q: So you're aware that they are offering that [8] type of service?

[9] A: I'm aware that they're offering software. My [10] understanding of the software that — software that [11] they were offering, as far as I understood it, was [12] more efficient ways to order. I don't know — I have [13] no knowledge of wholesalers supplying a software [14] package that would tell a customer how to cherry-pick [15] a product, so I don't know.

[16] Q: Have you — have you ever heard of the fact [17] that softwares — strike that.

[18] Have you ever heard of the fact that [19] wholesalers offer software to pharmacy customers that [20] calculates the spread between AWP and cost on NDC [21] numbers?

[22] A: I —

[23] MR. MCDONALD: Object to the form.

[24] MR. HAGENSWOLD: Object to form.

[25] THE WITNESS: I'm not really aware of